Memorandum

TO: Burt Neuborne

FROM: Meir J. Westreich

RE: Mark Lynch Memorandum of September 7, 1984 - H.R. 5164

AMERICAN
CIVIL LIBERTIES UNION
OF SOUTHERN CALIFORNIA

633 S. Shatto Place
Los Angeles, California 90005
Telephone (213) 487-1720

I.

PREFATORY REMARKS

I do not take issue with the bulk of the remarks of Mark Lynch insofar as they refer to common existing practices in FOIA litigation.[1] I do, however, have difficulty with some of his underlying assumptions. Further more, the restrictions imposed upon judicial review are in some cases so extreme as to go far beyond that which would be reasonalby necessary to accomplish their stated purposes---even assuming those purposes are apprpriate, which in some cases we would contend otherwise.

The core issues respecting judicial review are as follows:

1. Does the overall scheme of judicial review afford a reasonable prospect of enforcing the provisions of H.R. 5164 so that it will operate, in practice, as intended?

2. Even assuming that the judicial review provisions do in fact promise to afford such reasonable prospect of enforcement, do its terms comport with our notions of due process?

---

[1] Mark mistakes my meaning when he indicates that I erred in my July 31, 1984 memorandum when I stated that "perfunctory discovery" is still available in FOIA litigation. It was not my intent---although I can see how it might be so interpreted--- to state that discovery in FOIA cases is perfunctory. Rather, I was saying that certain types of perfunctory discovery--- i.e. superficial discovery like the names of custodians of records, etc. which do not implicate national security matters--- is occasionally available, and can be useful in attempting to justify a claim for further discovery. My sentence structure was rather inartful.

As to either question, current practices of the courts really have no relevance to the discussion. If the provisions of H.R. 5164 are unenforceable because of the judicial review restrictions, it matters not at all that it would be equally unenforceable even without such restriction. I agree with your general statement that the mere fact of creating a "two-envelope" system for search and review of CIA records opens a significant danger of abuse, especially with an agency with a history of abuse, and which believes that its mission includes lying when to do so would serve its perception of the national interest. Therefore, we would make no agreements with the CIA which are not clearly enforceable by means of judicial review. (Frankly, I believe that our affiliate would make no agreements with the CIA, given the fact that it continues to be engaged in activities which are contrary to our notions of civil liberties.)

Furthermore, if the restricitons on judicial review are inconsistent with our concepts of due process of law, then again it matters not at all that current practices are equally repugnant. No matter how much we might feel that we must broaden the scope of our tactics in defense of civil libertiis, to embrace the legislative as well as the judicial arenas, the courts remain the ultimate arbiters of individual liberties secured by our constitution. Furthermore, though litigation is admittedly expensive, legislation is even less the avenue for the poor, the unpopular and the powerless. Due process in our courts is the fundamental core of the system of protections of individual liberties, and we, at our great peril, agree to support <u>any</u> legislation that codifies restrictions on judicial review that we would not ourselves support in the first instance.

II.

DOES THE OVERALL SCHEME OF JUDICIAL REVIEW UNDER H.R. 5164 AFFORD A REASONABLE PROSPECT OF ENFORCING THE PROVISIONS OF THE BILL SO THAT IT WILL OPERATE, IN PRACTICE, AS INTENDED?

Mark makes one erroneous assumption: He assumes that litigation under H.R. 5164 will be fundamentally like litigation under the existing FOIA. While it is likely that claims under H.R. 5164 will frequently be joined with other more traditional claims under FOIA, the issues presented are fundamentlly different in two respects.

First, existing FOIA litigation centers most often on claims of exemption, asserted by the CIA to foreclose either disclosure or search and review. Under H.R. 5164,

the issues will most often be focused on whether the CIA has, in effect, abused the new exemption, by improperly placing or designating certain documents into the exempted "envelope." In other words, the complainant will be alleging illegal use of the exemption. Should we assume that in that context the courts would be as felicitous of the CIA's national security claims as they are when there are no allegations of such illegal or improper conduct?

Second, under existing FOIA litigation, most of a complainant's discovery needs involve information that is in the exclusive possession of the CIA, and which is also the information that is the ultimate objective of the lawsuit. Under H.R. 5164, that will frequently be the case, but not necessarily so. When a complainant is alleging, not merely a right to access, but a prior act of improper filing or designation, that contention raises an issue of historical fact, amenable to proof through avenues not necessarily under the exclusive control of the CIA---and hence not subject to a claim of privilege on the part of the CIA. An example would be in a case wherein a prior employee of the CIA reports that he has personal knowledge, or even third-hand knowledge, of improper filing or exemption of certain records. Or a third party might have received such information from an employee of the CIA. Should not a complainant have the opportunity to depose such potential witnesses? Or at least the opportunity to obtain leave of court to do so?

The bare and simple fact is that a complainant under H.R. 5164 will be required to have virtually all of his proof, in admissible form, prior to even filing his action. Mark errouneously states that the complainantis not restricted to sworn submissions, since he may also use "otherwise admissible evidence." The bill does not say that. It says that such allegations must be supported by "sworn written submissions based on personal knowledge or otherwise admissible evidence." (Emphasis added.)

Thus, if a complainant has information received via a third party, who claims to have received the information from a CIA employee, the complainant will be barred from any discovery to trace this hearsay evidence to admissible evidence; and unless he can convince a judge to hold a disfavored hearing, he will be barred from issuing a subpoena to the witness. Still worse, unless that witness has "personal knowledge or otherwise admissible evidence," and is willing to voluntarily execute a "sworn written submission" the complainant will not be able to even request a hearing because he will be unable to satisfy the threshold requirement that he support his complaint by "sworn written submissions based on personaly knowledge or otherwise admissible evidence."

How can we conclude that this bill is enforceable when the complainant has to prove his case at the threshold of

of the lawsuit, and cannot have access to the process of the court, via discovery of subpoena, in order to develop his proof?

Mark urges that under FOIA, and H.R. 5164 as well, the limitations on discovery are necessary because affording discovery permits the very thing that the exemption is designed to prevent. This argument holds up only if all useful discovery entails requiring the CIA to disclose or search and review the very thing that they are claiming is protected by exemption.

Thus, this argument has the force of logic when a complainant is seeking disclosure under FOIA of documents that the CIA claims is protected from disclosure by a particular exemption. In such cases, a privilege claim to discovery and the exemption claim to disclosure merge into a single set of co-extensive issues.

This might be the case as well under H.R. 5164 if a discovery request requires a response that would, by its terms, require search and review of all CIA operational files. However, such would not necessarily be the case. For instance, a complainant might have hearsay information as to where the improperly filed document might be located, without having information precise enough to submit a request for admission that could not be easily evaded. Properly limited discovery would only require the CIA to search and review certain particular files. Preclusion of such limited search and review can hardly be justified by saying that the purpose of this bill is to exempt such search and review. The stated purpose of H.R. 5164 is to exempt the CIA from having to routinely search and review all operational files as to all requests for disclosure under FOIA. Mark also urges that the requirement of "sworn written submissions based on personal knowledge or otherwise admissible evidence" is necessary to preclude complaints that are based solely on conclusory allegations that are unsupportable. According to this view, such complaints would tend to undermine the stated purpose of H.R. 5164 to relieve the CIA of some of its present FOIA burdens, which will facilitate, in turn, better CIA response to non-exempted requests for disclosure. However, this argument erroneously assumes that the choice is limited to those two (2) extremes.

It is already the established rule in civil rights cases under 42 U.S.C §§1983, 1985 and 1986 that complaints must state with some specificity the basis for the claims. Further, in those cases, the courts are now instructed to consider certain issues promptly on summary judgment, in some cases apparently without benefit of discovery. This rule is for the ostensible protection of public officials

from frivolous lawsuits. While we do not approve those more limited restrictions,, why would these restriction be inadequate to protect the CIA? At least under such a rule, a complainant with reliable information that is not yet in admissible form can, by discovery and further investigation after discovery, seek to develop admissible evidence for use at a subsequent hearing on the merits.

Furthermore, it is not very significant that under existing practice, hearings are rarely afforded. As previously noted, because there is little distinction between resolution of privilege claims on discovery and determination of exemption claims on he merits, FOIA cases frequently are decided in summary proceedings. However, where discovery will not require search and review of all operational files, resolution of a discovery dispute will not be concomitant with the issue presented on the merits: Whether the CIA should be obliged to search and review all operational files in response to a particualr request for disclosure. In many cases,. it will require reviewing few or no files. In fact, under the existing proposal, whereinrequests for admissions are permitted, will not theCIA have to review some files if they are asked to admit that a particulardocument is located in the operational files?

In fact, requests for admissions, if honestly responded to, would require search and review of operational files to the same degree as any other form of discovery. The Intelligence Committee Report incredibly justifies the distinction, in part, on the basis that requests for admissions, unlike other forms of discovery, do not present the risk of "potential damage which could ensue from CIA errors in responding to discovery requests." Thus, complainants are required to surrender discovery rights to protect the CIA from itself.

While Mark is correct in pointing out that a court can, in some circumstances, review docudments <u>in camera</u> or order production of some information, this possibility exists only in the context of a determination of the merits, and only after a complainant can meet the threshold requirements--- <u>i.e.</u> sworn written submissions based upon personal knowledge or otherwise admissible evidence. Because this threshold requirement is almost impossible to meet, all of the other "possibilities" available within the discretion of the court, or even explicitlyprovided for, are useless.

Finally, Mark and others argue that the restrictions that bar discovery and require "sworn written submissions based on personal knowledge or otherwise admissible

evidence" are limited to two (2) sets of issues: 1) Whether a document was improperly placed in an operational file; and 2) whether a file was improperly exempted under H.R. 5164. Mark further argues that the latter refers only to whether the file was improperly defined as an operational file, and not whether it falls within an exception to the exemption under H.R. 5164. This might be convincing if the language explicitly stated such---i.e. that the restrictions applied when the complainant has alleged that files were improperly designated as operational files.

However, the question that is presented by H.R. 5164 is whether the files are improperly exempted, and the language means just that: If it is not an operational file, then exemption is improper; if it is an operational file, but subject to one of the express statutory exceptions thereto, then exemption is improper.

To argue that the courts will make the distinction made by Mark also flies in the face of his own contention: That even under present practices, the courts are extremely felicitous of CIA concerns. If a complainant is alleging that a particular file is not properly designated an operational file, and, alternatively, that if it is properly designated, it is not exempt from search and review because it was the subject of an investigation, will a court truly apply the rigid statutory restrictions as to the former issue, and more lax standards for the latter issue? And if in fact, as Mark states, the statutory restrictions do no more that codify what is already restricted in practice, is this distinction even meaningful?

The point is that the CIA will almost certainly seek, at some point, to abuse the "two envelope" system. If the persons presently involved (whom we know to be honorable men who would only lie in the public interest) will not abuse the system, certainly there might again someday be some CIA officials who lose sight of the public interest and lie even when the national security does not require it. I cannot think of a lawyer who would want to try to prove such abuse under the restraints imposed by H.R. 5164, whether it is due to H.R. 5164, or existing practices. We take little comfort from assurances that are contained in a committee report when they culd just as well have been placed explicitly in the bill itself. Its absence from the bill only increases our fears.

III.

EVEN ASSUMING THAT THE JUDICIAL REVIEW PROVISIONS IN H.R. 5164 DO IN FACT PROMISE TO AFFORD REASONABLE PROSPECT OF ENFORCEMENT, DO THEY COMPORT WITH OUR NOTIONS OF DUE PROCESS?

Mark makes the beguiling argument that due process is not implicated in H.R. 5164 because it enforces rights created by statute. Hence, according to this view, since Congress can revoke those rights entirely, limitations on judicial review of those rights does not deny due process rights.

This is questionable law. It is certainly contrary to ACLU's notions of the breadth of due process rights. We do not support the old distinction made between rights and privileges (which even the Supreme Court repudiated in Roth). If there is a statutory provision for a particular entitlement, then it can be deprived or diminished only in compliance with requirements of due process of law. Furthermore, we do not necessarily accept the recent judicial rulings of what constitutes "due process of law" when involving review of agency administrative decisions---e.g. re public assistance entitlements.

In making this argument, Mark also fails to distinguish between review of different types of administrative actions. Those administrative actions which are themselves quasi-judicial in nature---and which themselves must then provide certain minimal due process rights, including discovery---are subject to various restrictions on judicial review. These restrictions only comport with due process if the administrative proceedings themselves afforded basic due process rights.

CIA determinations under H.R. 5164 will not be quasi-judicial in nature, and hence will afford no due process at all. The courts cannot then justify depriving due process in its proceedings by reliance upon administrative determinations. In fact, regulatory and legislative actions by agencies are usually merely "accorded great weight" in subsequent judicial proceedings, and the courts require proof of an abuse of discretion by the agency. Such cases, however, are litigated with procedures normally available in federal courts.

If the courts are now imposing restrictions on process available to litigants under FOIA that are not consistent with our notions of due process, then that should be one of our target efforts to resolve by legislation. If moving into the legislatures is to be an alternative to litigation, it should be for the purpose of curing the damage to civil liberties caused by judicial practices---not codifying it so that it becomes doubly difficult to remedy. Having passed H.R. 5164, we will no longer be able to cure the problem by

the device of convincing the courts of the lack of wisdom in the practice. We will then have to repeal the restrictions---and according to H.R. 5164 it will be only by explicitly repeal---or to convince a court that the restrictions are unconstitutional. Unfortunately, if H.R. 5164 passes, some organization other than the National ACLU will have to urge its unconstitutionality, since we would look rather silly doing so ourselves.

Finally, if there is no loss from existing practices in codifying these restrictions, then why does the CIA fight for the statutory restrictions so tenaciously? Undoubtedly, the CIA fears that existing judicial practices might someday be changed to their disadvantage.

Frankly, we are unwilling to assume that the courts will accept the argument that despite the explicit nature of these restrictive provisions, that Congress intended to add nothing to existing procedures. There is a rule of statutory construction that if Congress re-enacts a law verbatim, existing judicial interpretations of the statutory language are impliedly adopted by the Congress. Thus, if H.R. 5164 merely incorporated existing judicial review procedures, the courts would undoubtedly interpret that as indicating Congress' approval of existing FOIA litigation procedures. It is incongruous to argue that the courts will interpret provisions which, by their terms are more sweeping than anything presently in the FOIA, accomplish no more than reaffirming existing practices.

The combination of the threshold requirement on filing of the action---i.e. "sworn written submissions based on personal knowledge or otherwise admissible evidence"---and the sweeping restrictions on discovery render the judicial proceedings virtually ineffectual. Not only will the CIA now have the "two-envelope" system, but they will be free to abuse that system without any meaningful opportunity to require judicial oversight. Complainants will never get passed the first motion in all but the rarest of cases.

And what has ACLU obtained for these grave sacrifices, for this generous assistance to the CIA? We are told that we gain the unenforceable promise that the CIA will then cure its backlog and respond more quickly to new requests. And if they do not meet this obligation, why then we can sue the CIA, and seek judicial review of its new administrative practices. I will concede that this litigation would not necessarily be subject to the explicitly statutory restrictions under H.R. 5164. But has not Mark told us that under existing judicial practices, the courts do not permit discovery or hearings as a rule? So much for enforcing that promise.

IV.

CONCLUSION

Mark has done everything in his memorandum except explain how the terms of H.R. 5164 could be enforced. At most, he tells us that the express enforcement provisions are no more restrictive than those now employed in practice. Judging from the express terms, the present practices must be useless. Hence, whether guided by the express statutory provisions or those presently in practice, there will be no meaningful enforcement of H.R. 5164. And as the price for this unenforceable bill, we will agree to codify practices that we have consistently opposed both in FOIA litigation and all other litigation involving constitutional rights or statutory entitlements.

Wisdom seems to dictate a tactical retreat, as gracefully as we might be able to manage it. As much as we might wish to avoid embarrassment and damage to ACLU and to our personnel, we must calculate the far greater danger posed by enactment of H.R. 5164.

cc: Norman Dorsen
Ira Glasser
Mark Lynch
Morton Halperin
Jerry Berman
Frank Askin
Harriett Pilpel
Lawrence Herman
National Executive Committee
ACLU-SC Board of Directors